result in lower interstate access charge revenues for some CLECs.[30] Given those ongoing proceedings, it is indefensible for the Commission to insulate the ILECs' special access revenues from the market-opening provisions of the 1996 Act.

It is equally indefensible for the Commission to suggest that supra-competitive ILEC special access rates may be necessary as a pricing umbrella for inefficient CLECs. In the *Supplemental Order Clarification*, the Commission claimed that an "immediate transition to unbundled network element-based special access could undercut the market position of many facilities-based competitive access providers."[31] However, obtaining EELs at cost-based rates can hardly deter efficient entry and investment by ILECs or CLECs, or even artificially undercut the market position of any carrier group. As the Commission has repeatedly recognized, setting unbundled network element prices based on TELRIC encourages efficient levels of investment and entry by both competitive carriers and incumbent LECs.[32] In the words of the Commission,

> "In dynamic competitive markets, firms take action based . . . on the relationship between market-determined prices and forward-looking economic costs. If market prices exceed forward-looking economic costs, new competitors will enter the market. If their forward-looking economic costs exceed market prices, new competitors will not enter the market *and existing competitors may decide to leave*. Prices for unbundled elements under section 251 must be based on costs under the law, and that should be read as requiring that prices be based on forward-looking economic costs. New entrants should make their decision whether to purchase

30 *See, e.g., Common Carrier Bureau Seeks Additional Comment on Issues Relating to CLEC Access Charge Reform*, Public Notice, DA 00-2751, CC Docket No. 96-262 (rel. Dec. 7, 2000).

31 *Supplemental Order Clarification* at ¶ 18.

32 *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912, ¶¶ 49-50 (1999), *citing Local Competition First Report and Order*, 11 FCC Rcd 15499, 15813, ¶ 620.

> unbundled elements or to build their own facilities based on the relative economic costs of these options."[33]

Therefore, obtaining EELs at cost-based rates will not undercut the market position of any efficient competitors, and there is no legitimate policy basis for protecting the entrenched market position of inefficient carriers.

Lastly, CompTel urges the Commission to take this opportunity to promulgate a broader interpretation of its current rule on UNE combinations in Section 51.315(b) of its Rules. As CompTel and other parties have argued previously in this proceeding,[34] and as the Commission itself held in the *Local Competition First Report and Order*,[35] the prohibition on an ILEC's separation of UNEs that it "currently combines" can and should be read to apply to any UNEs which the ILEC normally or typically combines in its network. Such an interpretation would eliminate the current obstacle of having carriers first order the EEL functionality as a tariffed special access service and then convert the service as a pre-existing combination to an EEL. This cumbersome process not only adds cost and delay to the process of obtaining EELs, it affords the ILECs yet another opportunity to thwart EELs altogether by refusing to provision the special access services in a timely manner or to convert existing services to EELs. In the *UNE Remand Order*,[36] the Commission declined out of an excess of caution to address this matter because related rules were under review in appeals that were pending at the time before the U.S. Court of Appeals for the Eighth Circuit. Given that the Eighth Circuit ruled in that case last

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[33] *Local Competition First Report and Order*, 11 FCC Rcd at 15813, ¶ 620.

[34] *E.g.*, Petition for Reconsideration, filed by CompTel, CC Docket No. 96-98, filed Feb. 17, 2000, at 10-14.

[35] *Local Competition First Report and Order*, 11 FCC Rcd at 15648, ¶ 296.

[36] *UNE Remand Order*, 15 FCC Rcd at 3908-09, ¶ 479.

year,[37] the time is now ripe for the Commission to clarify the proper scope of Section 51.315(b) to remove the impediments to competitive entry posed by the unduly narrow interpretation of the rule which prevails today.

C. Use Restrictions Are Inconsistent With The Goals of the Act and of the Commission.

The goals that the Commission articulated in the *Supplemental Order* and *Supplemental Order Clarification* to justify EELs restrictions are inconsistent with FCC policies. In particular, use restrictions are contrary to the Commission's policies on creating incentives for competition. Indeed, the principle upon which TELRIC pricing is based is that "new entrants should make their decisions whether to purchase UNEs or build their own facilities based on the relative economic costs of these options."[38] The Commission established TELRIC pricing in order to ensure that the 1996 Act is implemented in a manner that is "pro-competition" rather than "pro-competitor."[39] The Commission forgot that fundamental lesson when it adopted EEL restrictions to bestow monetary benefits upon the ILECs.

The Commission recognized that if ILECs were allowed to charge rates that exceed TELRIC, new entrants' investment decisions would be distorted, and would lead to inefficient entry and investment decisions.[40] However, the Commission conceded in the *Supplemental Order Clarification* that special access rates exceed TELRIC-priced UNE rates, otherwise the use restrictions would be unnecessary. Because use restrictions on EELs protect above-TELRIC pricing of certain network functionalities, the Commission's policy has quite

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37 *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000).

38 *Id.*

39 *Id.* at ¶ 618.

40 *See id.* at ¶ 620.

possibly already induced inefficient investment by sending distorted pricing signals to the industry. As a result, the Commission's EELs restrictions have violated bedrock Commission policies regarding the need for cost-based pricing of wholesale inputs in order to maximize consumer welfare under the Communications Act of 1934.

It also bears emphasis that the Commission's UNE use restrictions are inconsistent with the impair standard that the Commission adopted and applied in the *UNE Remand Order* only 18 months ago. In applying the impair standard, the Commission stated that it would consider the following factors: (1) rapid introduction of competition in all markets; (2) promotion of facilities-based competition, investment, and innovation; (3) reduced regulation; (4) certainty in the market; and (5) administrative practicality.[41] The restrictions on EELs imposed in the *Supplemental Order* and extended in the *Supplemental Order Clarification* are contrary to each of the five factors identified by the Commission. In particular, the EEL restrictions (1) significantly decrease the speed with which competition is introduced in all markets; (2) interfere with efficient facilities-based competition; (3) significantly increase the regulation that both ILECs and competitive carriers face; (4) reduce certainty in the market; and (5) are not practical from an administrative standpoint.

The past 18 months have demonstrated that restrictions on the use of EELs have decreased the speed with which competition is introduced and reduced certainty in all markets, because the restrictions have led to disputes about whether a competitive carrier meets the qualifications and emboldened many ILECs to refuse to provide EELs to any requesting carriers. Disputes over the requirements for the use restrictions began immediately after the *Supplemental Order*. Paradoxically, those disputes led the Commission to adopt a more complex, less

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41 *UNE Remand Order* at 3745-50, ¶¶ 101-116.

understandable "clarification." Unfortunately, that "clarification" actually has led to even more disputes between ILECs and competitive carriers. The result has been that few carriers have been able to integrate EELs into their business plans, even if they provide a "significant amount of local exchange service." Moreover, entry is delayed because carriers do not have accurate information about the availability of EELs. Certainly, carriers who do not propose using EELs to provide "a significant amount of local exchange service" are impeded because they are denied EELs under the Commission's policy. Given the speed with which technology and service offerings evolve, there is nothing that the Commission could do to lessen the uncertainty that the service-specific use restrictions cause apart from immediately lifting them altogether.

The Commission's use restrictions also interfere with facilities-based competition because they create incentives for inefficient entry and investment. The EEL restrictions force an entrant to choose between investing in unnecessary facilities in order to obtain a cost benefit compared to supra-competitive special access rates, or simply paying excessive special access rates to the ILECs and investing fewer resources in other aspects of its business model. Either way, the outcome is sub-optimal from the perspective of competition and economic welfare. Further, a carrier may change its business plan to minimize the use of extended loops because it cannot purchase that functionality at cost-based rates in the market today. Simply put, the Commission's use restrictions interfere with the efficient investment decisions that carriers would make if UNEs were available, as Congress required, to use in the provision of any telecommunications services.

The Commission's use restrictions also have increased significantly the regulation that competitive carriers face. The current "interim" restrictions are so complex that by comparison the Internal Revenue Code looks simple. The Commission's order "clarifying" this policy is over four times longer than the order originally imposing the restrictions. Further, the so-called clarification has done nothing but generate confusion, delay and uncertainty. Even today the parties cannot agree on the precise meaning of any of the three options specified by the Commission as rendering an entrant qualified to receive an EEL. Parties are spending resources litigating these options that could be better spent entering the market and competing against the ILECs. Even when one of these options is satisfied, there is an enormous regulatory cost, as carriers must modify their research and market planning operations, add a series a questions to the list that sales personnel must ask potential subscribers, and implement a monitoring system to determine continued compliance, particularly because ILECs have the right to "audit" a carrier's use of EELs to determine whether the carrier meets the requirements. Thus, the EEL restrictions are an administrative nightmare that undermine the ability of CLECs to use UNEs to provide telecommunications services to subscribers.

The use restrictions are also simply not practical from an administrative standpoint. Perhaps the biggest problem is that all three options focus on factors that are beyond the ability of the CLEC (and for some options, even the customer) to control or to know. Even if a CLEC meets the criteria and qualifies for an EEL, the customer may subsequently fall below the requisite threshold without its or its customer's knowledge. In that case, the CLEC would no longer qualify for the EEL and it could be forced to pay a penalty to the ILEC in the form of back-billed special access rates. Indeed, it may even be at risk of "losing" the EEL and suffering an interruption in service for its customer should the ILEC seek to punish the carrier for falling out of compliance with the requisite thresholds. This type of business uncertainty is an enormous barrier to entry for competitive telecommunications providers. As a regulatory regime, it is reckless and illegal to adopt a system that imposes monetary *penalties* on carriers based on factors that are outside the ability of the carriers to control or even know.

II. USE RESTRICTIONS VIOLATE THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE 1996 ACT

We have shown above that EEL restrictions serve no rational public policy purpose. However, the Commission need not even undertake such an inquiry because, as we show below, such restrictions are contrary to the market-opening provisions of the 1996 Act. Even if the Commission could identify a legitimate public purpose that these restrictions would promote (and we submit it cannot), it could not adopt these restrictions because they are contrary to the statute.

Use restrictions on UNEs are inconsistent with the plain language of the statute. The statute defines a "network element" as a "*facility or equipment* used in the provision of a telecommunications service . . . includ[ing] features, functions, and capabilities that are provided by means of such facility or equipment."[42] Section 251(c)(3) imposes upon ILECs the "duty to provide" access to network elements "to *any* requesting telecommunications carrier for the provision of *a telecommunications service*."[43] Section 251(d)(2) in turn requires the

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[42] 47 U.S.C. § 153(29) (emphasis added).

[43] *See* 47 U.S.C. § 251(c)(3) (emphasis added). Section 251(c)(3) of the 1996 Act imposes upon ILECs:

> The duty to provide, *to any requesting telecommunications carrier for the provision of a telecommunications service*, nondiscriminatory access to network elements on an unbundled basis *at any technically feasible point* on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements *in a manner that allows requesting carriers*

(continued...)

Commission to determine which particular network elements ILECs must make available "for the purposes of section 251(c)(3)," that is, "for the provision of a telecommunications service." Therefore, the statute expressly requires the Commission to unbundle the network on an element-by-element basis and the ILECs to provide access to these unbundled network elements to "*any* requesting telecommunications carrier" so long as the carrier uses the network element to provide "a telecommunications service." There is no basis in the statute for conditioning access to network elements based on the type of telecommunications service that the requesting carrier will provide using the network element.

The Commission reached this same conclusion in the *Local Competition Order*, which it reaffirmed in the *Third Report and Order* of 1999. In the *Local Competition Order*, the Commission held that the statute "permits interexchange carriers and all other requesting carriers, to purchase unbundled elements for the purpose of providing exchange access services to themselves in order to provide interexchange services to consumers."[44] The Commission explained that access to unbundled network elements cannot be conditioned upon the requesting carrier offering local service to its customers because "the plain language of Section 251(c)(3) does not obligate carriers purchasing access to network elements to provide all services that an unbundled element is capable of providing or that are typically provided over that element" or "impose any service-related restrictions or requirements on requesting carriers in connection with the use of unbundled elements."[45]

(...continued)

> *to combine such elements in order to provide such telecommunications service.*

47 U.S.C. § 251(c)(3) (emphasis added).

44 *Local Competition Order* at ¶ 356; *UNE Remand Order* at ¶ 484.

45 *Local Competition Order* at ¶ 264.

The Commission's conclusion that the statute forbids usage restrictions follows naturally from the statutory definition of "network element." The Act defines the term "network element" as:

> "a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."

Importantly, this definition is based on facilities and equipment that can be used to provide telecommunications services rather than on the telecommunications services themselves. As the Commission has explained, "network elements are defined by facilities or their functionalities or capabilities, and thus, cannot be defined as specific services."[46] "[W]hen interexchange carriers purchase unbundled elements from incumbents, they are not purchasing exchange access 'service'" or any other particular "service."[47] Instead, the carriers are purchasing access to a functionality that can be used to provide a service when combined with other elements and/or functionalities. Therefore, once a carrier purchases access to an element, the carrier can use that element at its, and its customer's, discretion to provide any service the element is capable of supporting.[48]

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46 *Id.*

47 *Id.* at ¶ 358.

48 In the *Supplemental Order Clarification,* the FCC claims that it adopted a use restriction on shared transport in the *Local Competition Third Order on Reconsideration. See Supplemental Order Clarification* at ¶ 3. However, in the *Local Competition Third Order on Reconsideration*, the FCC specifically stated that it was not adopting a use restriction, but rather recognizing how the network element would be utilized in practice. Moreover, the FCC has not yet adopted a final rule on this issue. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd 12460, 12494-96, ¶¶ 60-61. In any event, to the extent that the FCC's previous ruling is a use restriction, it is unlawful and subject to reversal on appeal.

Use restrictions are fundamentally inconsistent with the statutory definition of "network element" because they focus on marketplace conditions regarding a "service" that can be provided using a particular facility or equipment rather than the availability in the marketplace of the facility or equipment itself. If Congress had intended the Commission to adopt use restrictions, it would have defined the term "network element" as "a telecommunications service provided using a facility or equipment." Instead, Congress intended the Commission to focus on the availability in the marketplace of "a facility or equipment used in the provision of a telecommunications service," regardless of the specific type of service for which the requesting carrier will use that facility or equipment to provide.

The Commission codified its conclusion that the Act does not permit usage restrictions in Rule 51.309(a), which provides that an "incumbent LEC shall not impose limitations, restrictions, or requirements on request for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends."[49] Similarly, Rule 51.307(c) requires ILECs to provide UNEs "in a manner that allows the requesting carrier to provide any telecommunications carrier to provide *any telecommunications service that can be offered by means of that network element.*"[50] The Commission found that its conclusion not to impose restrictions on the use of unbundled network elements was "compelled

49 47 C.F.R. § 51.309(a). As the FCC noted in the *UNE Remand Order*, Rule 51.309(a) was not challenged in court by any party. *UNE Remand Order* at ¶ 485. The FCC further adopted Rule 51.307(b), which provides that a "telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide interexchange services to subscribers." 47 C.F.R. § 51.309(b).

50 47 C.F.R. § 51.307(c) (emphasis added). Rule 307's emphasis on "any telecommunications service capable of being offered" underscores that carriers are free to use UNEs in ways that differ from the ILECs' classifications, and even to substitute for other services provided by an ILEC.

by the plain language of the 1996 Act" because exchange access and interexchange services are "telecommunications services."[51] The Commission emphasized that "there is no statutory basis by which we could reach a different conclusion,"[52] because the statutory language is "not ambiguous."[53]

It is well established that where "Congress has directly spoken to the precise question at issue," the Commission "must give effect to the unambiguously expressed intent of Congress."[54] Here, Congress has spoken to the precise question at issue: Can the Commission impose use restrictions on the availability of unbundled network elements? Congress unambiguously expressed its intent that use restrictions are prohibited, as the Commission itself has repeatedly found. The statute's only requirement is that an unbundled network element, which the statute defines as a facility or equipment, be used in "the provision of a telecommunications service." Therefore, the unambiguously expressed intent of Congress must be given effect by prohibiting all use restrictions.[55]

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51 *Local Competition Order* at ¶ 356; *UNE Remand Order* at ¶ 484.

52 *Local Competition Order* at ¶ 356.

53 *Id.* at ¶ 359.

54 *See, e.g., AT&T v. FCC*, 220 F.3d 607 (D.C. Cir. 2000), *quoting Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

55 The Commission cannot rely on Section 154(i) standing alone to adopt a use-based restriction. It is well established that the Commission has no authority to promulgate regulations contrary to express statutory provisions. *See* 47 U.S.C. § 154(i) (the Commission "may perform any and all acts . . . not inconsistent with this Act"); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 201 (1956) ("§ 154(I) . . . grant[s] general rulemaking power not inconsistent with the Act or law"). Because Section 251(c)(3) mandates that interexchange carriers be allowed to purchase unbundled network elements in order to provide any telecommunications service, including exchange access, the Commission has no authority to rely on Section 154(i) by itself to adopt use-based restrictions. Finally, the Commission cannot forbear from applying Section 251(c)(3) in order to adopt a use-based restriction because Section 251 has not been fully implemented. *See* 47 U.S.C. § 160(d) ("[T]he Commission may not forbear from applying the requirements of section 251(c) . . . until it determines that those requirements have been fully implemented.).

III. <u>THE 1996 ACT PROHIBITS THE COMMISSION FROM APPLYING THE IMPAIR STANDARD ON A SERVICE-BY-SERVICE BASIS.</u>

The Commission instituted a subtle but extremely dangerous shift in its approach to EELs in the *Supplemental Order Clarification*. Perhaps in recognition of the futility of trying to justify use restrictions on UNEs under the statute and the Commission's prior decisions, the FCC suggested for the first time that a UNE itself might be defined by the use to which it is put by the requesting carrier. In order to effectuate this novel approach, the Commission suggested, again for the first time, that the impair standard must be applied to any particular network functionality on a service-by-service basis. These novel statutory interpretations must be rejected because they are contrary to the statute and represent bad public policy.

A. It Is Contrary to the 1996 Act To Apply the Impair Standard on a Service-By-Service Basis.

The Commission has never before applied the impair standard on a service-by-service basis. In fact, until the *Supplemental Order Clarification*, it was well-settled that the plain language of the 1996 Act required the Commission to apply the impair standard to specific network functionalities, not on a service-by-service basis. As the Commission explained in the *Local Competition First Report and Order*, "the language of section 251(c)(3), which provides that telecommunications carriers may purchase unbundled elements in order to provide a telecommunications service, is not ambiguous."[56] Up to and including the *UNE Remand Order*, the FCC has always applied the impair standard on a functionality-by-functionality basis.

The service-by-service approach suggested in the *Supplemental Order Clarification* is contrary to the statutory language. Section 251(d)(2) expressly provides that the Commission shall apply the impair standard for the purpose of determining "what *network elements* should be made available."[57] The term "network element" is defined in Section 153(24) as a "facility or equipment" and includes all "features, functions, and capabilities that are provided by means of such facility or equipment."[58] The Commission's own definition of the term "network element" mimics the statutory language.[59] It is contrary to those unambiguous statutory and regulatory provisions for the Commission to suggest now that a particular functionality qualifies as a UNE depending upon the service it is used to provide.

In the *Supplemental Order Clarification*, the Commission claimed that application of the impair standard on a service-by-service basis is "similar" to the approach the Commission used in the *UNE Remand Order*.[60] As evidence of this similarity, the Commission pointed to its observation in the *Third Report and Order* that it is "appropriate for us to consider the particular types of customers that the carrier seeks to serve" because "Section 251(d)(2)(B) requires us to

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56 *Local Competition Order*, 11 FCC Rcd at 15679, ¶ 356. The Commission codified its interpretation of section 251(c)(3) in Rule 51.309(a), which provides that "[a]n incumbent LEC shall not impose limitations, restrictions, or requirements on request for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends." 47 C.F.R. § 51.309(a). This rule was not challenged in court by any party, as the Commission pointed out in the *UNE Remand Order*. *UNE Remand Order* at ¶ 484.

57 47 U.S.C. § 251(d)(2).

58 47 U.S.C. § 153(24).

59 47 C.F.R. § 51.5.

60 *Supplemental Order Clarification* at ¶ 15.

consider whether lack of access to the incumbent LEC's network elements would impair the ability of the carrier to provide the *services* it seeks to offer."[61] However, this observation is not evidence that the Commission applied the impair standard on a service-by-service basis in the *UNE Remand Order*. To the contrary, the Commission applied the impair standard on a functionality-driven basis. The Commission considered the types of customers that carriers seek to serve not in order to determine who is entitled to receive access to a particular unbundled network element, but rather in order to assess whether CLECs could feasibly self-provision the functionality or reasonably acquire it from a third-party supplier. Put in other words, although the Commission can consider the services that carriers may use a functionality to provide when necessary to apply intelligently the impair standard, the Commission's task is to determine whether *the functionality* does or does not qualify as a mandatory network element. The Commission does not have the authority to define the term "network element" more narrowly than the statute by specifying the services that it may be used to provide.

B. It Is Contrary to the Supreme Court Decision To Apply the Impair Standard on a Service-By-Service Basis.

The Supreme Court endorsed applying the impair standard on a functionality-by-functionality basis when it upheld the Commission's rules and policies on UNEs in *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999). In that decision, the Court held that the FCC's application of the "network element" definition was "eminently reasonable."[62] Moreover, the Court explained that "Section 251(d)(2) does not authorize the Commission to create isolated exemptions from the underlying duty to make all network elements available. It requires the

61 *UNE Remand Order*, 15 FCC Rcd 3737-38, ¶ 81 (emphasis in original).

62 *AT&T Corp. v. Iowa Util. Bd.*, 119 S. Ct. 721, 734 (1999).

Commission to determine on a rational basis *which* network elements must be made available."[63] Therefore, the Commission cannot define UNEs by the telecommunications services they are used to provide.

The Court's holding in *AT&T Corp. v. Iowa Utilities Board* that the Commission did not adequately consider the "necessary and impair" provisions has no effect on the Commission's long-standing practice of applying the impair standard on a functionality-by-functionality basis. In fact, the Court identified only two flaws in the Commission's application of the impair standard. First, the Commission improperly disregarded the availability of elements outside the network when determining whether the failure to obtain access to nonproprietary elements would impair the ability to provide services.[64] Second, the Commission improperly regarded *any* "increased cost or decreased service quality" as establishing an impairment of the ability to provide service.[65] Neither finding even arguably casts doubt on the Commission's traditional approach of applying the impair standard (as it did on remand from the Supreme Court) on a functionality-by-functionality basis. Therefore, the Commission was flatly incorrect to suggest that the Supreme Court mandated (or even approved) a service-by-service approach to the impair standard.

C. It Is Contrary to Past FCC Decisions To Apply The Impair Standard on a Service-By-Service Basis.

In the *UNE Remand Order*, the Commission did not apply the impair standard on a service-by-service basis. Rather, the Commission applied the new impair standard in the *UNE Remand Order* to specific network functionalities to compile a new list of the network elements

63 *Id.* at 736.

64 *Id.*

65 *Id.*

that must be unbundled. Based on a functionality-driven application of the impair standard, the Commission found various functionalities to be mandatory UNEs without engaging in a service-by-service approach, including loops; subloop elements; the network interface device; switching; transport, signalling and call-related databases; and operations support systems.[66] Although the Commission sought comment on whether certain statutory provisions may permit use restrictions on UNEs, the Commission never once suggested that the scope of the UNE itself could be narrowed by the services the UNE was used to provide.

Even when the Commission first imposed the EEL restrictions in the *Supplemental Order*, the Commission nowhere claimed that the impair standard could be applied on a service-by-service basis. Rather, the Commission's EEL restrictions governed the use, not the definition, of the UNEs which together constitute the EEL. The Commission sought to justify the EEL restrictions as merely a "temporary transitional mechanism to help complete all of the steps toward the pro-competitive goals of the 1996 Act, including the full implementation of a competitively-neutral system to fund universal service and a completed transition to cost-based access charges." Therefore, the Commission urged parties to consider and address what long-term solutions, other than use restrictions, may be necessary to avoid adverse effects on any special access revenues that support universal service.[67]

It was not until the *Supplemental Order Clarification* that the Commission suggested that it might be consistent to apply the impair standard on a service-by-service basis.

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66 *See, e.g., UNE Remand Order* at ¶ 15. Similarly, the FCC established the high-frequency loop UNE in December, 1999 without engaging in a service-by-service application of the impair standard. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of* 1996, CC Docket No. 98-147, FCC 01-26 (rel. Jan. 19, 2001) ("*Line Sharing Remand Order*").

67 *Supplemental Order* at ¶ 6.

In this order, the Commission claimed that the Court's decision in *Iowa Utilities Board* made it appropriate to revisit the impair standard again, despite the fact that the Commission had already implemented the Supreme Court's decision without using a service-by-service approach in *Third Report and Order*. Further, as noted above, the Supreme Court's decision upheld the Commission's functionality-driven approach to applying the impair standard, and does not state or suggest that a service-by-service approach was mandated by Congress. In short, the service-by-service approach to applying the impair standard did not exist until the Commission invented it in the *Supplemental Order Clarification* as a means of shoring up a deficient legal justification for imposing use restrictions on EELs.

D. It Is Contrary to the Statutory Nature of UNEs To Apply the Impair Standard on a Service-By-Service Basis.

Application of the impair standard on a service-by-service basis is contrary to the very nature of UNEs as facilities, equipment and functionalities.[68] As the Commission has explained, "when interexchange carriers purchase unbundled elements from incumbents, they are not purchasing exchange access 'service,'"[69] but rather access to a functionality that, when combined with other functionalities, can be used to provide "a telecommunications service." Once a requesting carrier purchases access to an element, it can use the element at its, and its customer's, discretion to provide any technically feasible telecommunications service. The Commission recognized this point when it held that "network elements are defined by facilities or their functionalities or capability, and thus, cannot be defined as specific services."[70]

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68 As explained above, the Supreme Court explicitly affirmed the Commission's interpretation of UNEs as functionalities and facilities in *AT&T v. Iowa Utilities Bd.*

69 *Local Competition Order* at ¶ 358.

70 *Id.* at ¶ 264.

Given the nature of UNEs as functionalities and facilities, the availability of a UNE in the marketplace – the critical statutory inquiry that the Commission must undertake when applying the impair standard – has absolutely nothing to do with the particular service the requesting carrier will provide using the UNE. For example, one's ability to buy a backhoe in the marketplace does not depend upon whether one plans to construct a driveway or a swimming pool. If the backhoe is neither available from third-parties nor able to be manufactured by the competitor itself at a reasonable cost, the competitor will be impaired in its ability to provide service regardless of whether that service is the construction of driveways or swimming pools. Therefore, the inquiry that the Commission is now conducting – an exploration of the connection between the local exchange and exchange access market – is irrelevant to the application of the impair standard.

E. It Is Contrary to Fundamental UNE Policies To Apply the Impair Standard on a Service-By-Service Basis.

The Commission's decision to experiment with a service-by-service application of the impair standard would result in the direct repudiation of policies previously considered to be necessary and appropriate to ensure that Section 251(c)(3) achieves the pro-competitive purposes desired by Congress. In particular, the Commission suggests that it should examine whether "local exchange service" and "special access" are so intertwined as to make a single impairment analysis appropriate for both market segments.[71] However, in conducting such an inquiry, the Commission inevitably will run afoul of its fundamental policy decision to determine whether a specific functionality qualifies as a mandatory UNE without taking into account the functionality's availability as a tariffed service offering by the ILEC.

71 *Supplemental Order Clarification* at ¶ 14.

As the Commission explained in the *Third Report and Order*, little weight is assigned in the "impair" analysis to the "ability of a requesting carrier to use the incumbent LECs' resold or retail tariffed services as alternatives to unbundled network elements."[72] This stems from the Commission's conclusion in the *First Report and Order* that allowing ILECs to deny access to unbundled elements solely, or primarily, on the grounds that an element is equivalent to a service available at resale would lead to impractical results; ILECs could completely avoid Section 251(c)(3)'s unbundling obligations by offering unbundled elements to end users as retail services. Thus, "[d]enying access to unbundled elements on the grounds that an incumbent LEC offers an equivalent retail service could force requesting carriers to purchase, for example, an unbundled loop and switching out of an incumbent's retail tariff at a wholesale discount, subject to all of the associated tariff restrictions."[73] In effect, the impair standard cannot be applied meaningfully, and as Congress intended, if the Commission takes into account the tariffed monopoly service offerings of the ILECs.

Any analysis of the relationship between local exchange and special access services when applying the impair standard will run afoul of this fundamental rule. The reason is that the special access market segment is, for all practical purposes, dominated by the tariffed special access services of the ILECs. Therefore, to examine the "special access" options available to new entrants in the marketplace today inevitably will focus on the functionalities that carriers may purchase directly from the ILECs' tariffs. This is precisely the type of inquiry which the Commission decided it would not conduct when applying the impair standard. For example, the Commission will not determine whether carriers are impaired without access to

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72 *UNE Remand Order* at ¶ 67.

73 *Id.*

loops as mandatory UNEs by examining the retail local exchange services that a carrier may be able to purchase out of an ILECs' tariffs. The same conclusion applies to any examination of the "special access" market segment. The Commission must reject the service-by-service approach to applying the impair standard because it will bring the Commission squarely into conflict with its well-established policies on implementing Section 251(c).[74]

IV. THE COMMISSION SHOULD NOT ADOPT ANY FURTHER "INTERIM" RESTRICTIONS ON EELS.

The Commission cannot justify any EEL restrictions on the theory that they are "interim" in nature. The Commission claims that its decision to impose an "interim" use restriction is consistent with its "finding in the *Local Competition First Report and Order* that [it] may, where necessary, establish a temporary transitional mechanism to help complete all of the steps toward the pro-competitive goals of 1996 Act, including the full implementation of a competitively-neutral system to fund universal service and a completed transition to cost-based access charges."[75] As such, the Commission seeks to rely on the Eighth Circuit's decision in *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) ("*CompTel*"), which upheld a unique transitional rule that the Commission adopted in the *Local Competition First Report and Order*.

[74] In addition, the Commission should be careful before undertaking any inquiry into "marketplace developments" in the wake of the *UNE Remand Order*. *See Supplemental Order Clarification* at ¶ 16. The Commission has previously indicated that it will not apply the impair standard for one functionality based on the services that a carrier may provide using other UNEs. *See UNE Remand Order* at ¶ 51 (holding that impair analysis requires FCC to examine availability of functionalities "outside the incumbent's network"). As a result, it would be impermissible, and contrary to the Commission's previous holdings, to find that the impair standard is not met for EELs because of marketplace developments directly attributable to the wider availability of UNEs mandated by the Commission in the *UNE Remand Order*.

[75] *Supplemental Order* at ¶ 7.

The Commission's reliance on the *CompTel* decision is misplaced. In *CompTel*, the Eighth Circuit upheld a transitional rule that applied during the nine-month period between the August 1996 statutory deadline for implementation of section 251, which requires cost-based rates for unbundled network elements, and the May 1997 statutory deadline for implementation of section 254, which is designed to promote universal service. The transitional rule allowed ILECs to continue assessing interstate access charges on top of UNE rates until the May 1997 statutory deadline because access charges contained implicit subsidies for universal service.[76]

In *CompTel*, the court agreed with the Commission that a temporary deviation from the Act's mandate of cost-based charges was necessary to ensure a smooth transition to implement another of the Act's mandates, the reform of universal service.[77] Specifically, the pricing decision in *CompTel* was required by explicit and necessarily conflicting statutory provisions and deadlines imposed on the Commission. Although the Commission had to adopt its UNE rules by August 1996, Section 254 did not require a decision on universal service until May 1997. The Court found that, due to the nine month disparity between these statutory deadlines, "universal service soon would be nothing more than a memory" without an interim pricing rule.[78] Thus, the rule was necessary "in order to effectuate" Section 254.[79] In upholding the temporary rules, the court declined to determine whether the Commission's approach was the best way to maintain universal service on a transitional basis because the temporary rule had a fixed expiration date that coincided with the statutory deadline for universal service reform.

76 *See Local Competition Order* at ¶ 720.

77 *CompTel*, 117 F.3d at 1074 ("We do not think it contrary to the Act to institute access charges with a fixed expiration date, even though such charges *on their face* appear to violate the statute, in order to effectuate another part of the Act.").

78 *Id.* at 1074.

79 *Id.*

The circumstances in *CompTel* that led the Eighth Circuit to allow universal service principles temporarily to take precedence over the pricing standards of the 1996 Act no longer exist. The statutory deadlines for implementation of sections 251, 252 and 254 have long passed. Moreover, there are no universal service subsidies built into special access rates, and the Commission has already removed the implicit universal service subsidies from access charges while creating a more explicit universal service funding mechanism. Thus, the nine-month period between the statutory deadlines for implementation of section 251 and section 254 is no longer relevant, and there is no need to harmonize apparently conflicting provisions of the Act. Lastly, in sharp contrast to the transitional rule reviewed in the *CompTel* decision, the use restriction at issue here is inconsistent with the plain language of the Act, and is not necessary to effectuate any other parts of the Act. Certainly, there is no longer any credible argument that the EEL restrictions are necessary to preserve universal service subsidies built into switched access charges.

V. THE ACT PROHIBITS RESTRICTIONS ON CO-MINGLING

ILECs have used the illegal use restrictions that the Commission imposed in the *Supplemental Order* and extended indefinitely in the *Supplemental Order Clarification* as a sword to deny requesting carriers the ability to combine UNEs with other types of traffic that they route over facilities or services obtained from the ILECs. The Commission now requests comment on whether it should modify or continue its prohibition on the "co-mingling" of UNEs with tariffed access services.[80]

[80] *Notice* at ¶ 3.

CompTel strongly opposes the Commission's prohibition of co-mingling. In addition to constituting a use restriction in violation of the 1996 Act, the co-mingling prohibition is bad public policy. The co-mingling language in the Commission's order has been used by ILECs to force their competitors to operate two separate networks – one for UNE traffic and another for other traffic – even when it is significantly more efficient from both an economic and an engineering standpoint to route all traffic over a single integrated network.

For example, many CLECs desire to take advantage of economies of scale by extending their DS-3 trunks as far into the local exchange network as possible, while using DS-1 trunks to bring traffic from more distant end offices to these DS-3 trunks. The DS-1s can carry both UNE and non-UNE traffic. In the absence of an illegal use restriction, CLECs could purchase their local transport via UNEs instead of special access. Accordingly, a CLEC could convert its DS-1 lines that it uses to carry local traffic into UNEs, bring those DS-1s to an end office with a DS-3 that the CLEC has purchased out of the ILECs' special access tariff, and then multiplex the DS-1s onto the DS-3. However, the Commission's co-mingling policy can be construed to prohibit such an efficient routing configuration, thereby forcing the CLEC to resort to network routing configurations that are more expensive and less efficient.

Any such co-mingling prohibition discriminates against CLECs because it would require them to incur additional costs to construct duplicative networks that the ILECs are not required to construct: one to carry UNE-only traffic and one to carry all other traffic. Moreover, co-mingling has no impact whatsoever on the Commission's unbundling requirements, because the ILECs would continue to be compensated for access services at their tariffed rates. Thus, the co-mingling prohibition is blatant discrimination that fails to promote competition or any other discernible public policy.

A co-mingling prohibition also would force CLECs to bear the additional discriminatory cost of acting as an "insurer" of its customer's future use of communications. Given the constantly changing usage patterns of telecommunications services, which are driven by factors beyond the CLEC's control (*i.e.*, Internet, packetized voice, externally accessed computer applications), the "risk" that the Commission has transferred from the ILEC to the CLEC is not only impossible to quantify or valuate (because historical customer usage patterns will not allow a reliable prediction of future use), but also another form of an illegal use restriction.

VI. THERE IS NO NEED TO DETERMINE WHETHER THE EXCHANGE ACCESS MARKET IS DISTINCT FROM THE LOCAL EXCHANGE MARKET TO APPLY THE IMPAIR STANDARD

In the *Notice,* the Commission asks a series of questions about whether the exchange access and local exchange markets are so interrelated from an economic and technological perspective that a finding that a network element meets the "impair" standard under section 251(d)(2) of the Act for the local exchange market would itself entitle competitors to use that network element solely or primarily in the exchange access markets.[81] As explained above, the Act requires that the Commission to apply the impair standard on a functionality-by-functionality basis. As such, a finding that a functionality meets the "impair" standard entitles carriers to use that network element to provide any telecommunications service, including exchange access service. Therefore, it is unnecessary and legally irrelevant to determine whether the exchange access and local exchange markets are interrelated for purposes of Section

81 *Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service*, Public Notice, CC Docket NO. 96-98, DA 01-169 (rel. Jan. 24, 2001).

251(d)(2). Accordingly, CompTel does not here address the empirical issues raised by the Commission.

The Commission also requests comment on issues relating to whether carriers are impaired without access to EELs in the special access and private line market. However, the Commission found in the *UNE Remand Order* that EELs meet the impair standard. Consequently, carriers are impaired without access to EELs no matter what service they seek to provide. Therefore, it is not necessary or appropriate to revisit the Commission's findings of impairment in the *UNE Remand Order*, and CompTel does not address that issue further in these comments.